SUPREME COURT, U.S.
Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1970

No. 1149

WILLIAM J. DAVENPORT,

Petitioner,

*v.*

CITY RENT and REHABILITATION ADMINISTRATION of the City of New York, JOHN V. LINDSAY, as Mayor of the City of New York,

Respondents.

## BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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### Statement

Petitioner's motion for a writ of certiorari seeks to review an order of the United States Court of Appeals for the Second Circuit dated September 24, 1970. That order, without opinion, dismissed the appeal from a judgment of the United States District Court for the Southern District of New York (Tenney, J.) which had dismissed plaintiff's complaint.

## Question Presented

Were any substantive or procedural rights of the petitioner denied when the Court of Appeals granted respondents' motion to dismiss the appeal predicated on a showing that the petitioner had unsuccessfully litigated the same issues in earlier litigation between the same parties?

## Facts

The New York City rent control law grants exemption, with some exceptions, from rent control for apartments placed on the rental market by the owner after he has lived in the housing unit for at least one year. N.Y.C. Admin. Code, Sec. Y51-3.0, subd. e, para. 2, subpara. (i)(3). The question of a landlord's right to the exemption is usually one of fact.

Proceedings before the New York City Rent Administration several years ago resulted in findings that the petitioner Davenport was not entitled, as he had claimed, to decontrol of five separate apartments in a single building owned by him at 575 East 168th Street, Bronx, N. Y. Davenport took an administrative appeal, a protest, which was denied (A. 1a-11a). He then brought judicial review proceedings in the Supreme Court, New York County, which sustained the administrative determination (A. 12a-13a). The Appellate Division of the New York Supreme Court, First Department, affirmed without opinion, *Matter of Davenport* v. *Berman*, 27 A D 2d 903, 280 N.Y.S. 2d 534. The Appellate Division decision was not further appealed.

Essentially, the same grievance was the basis for a new federal action by Davenport in which he asserted that rent control as a whole imposed burdens on both landlords and tenants. Davenport also asserted that, as a Negro, he was further aggrieved by the rent control law which he claimed

constituted a form of enslavement and discrimination. Davenport's complaint was dismissed in an order and opinion of Cannella, J., dated July 25, 1969 (A. 14a-18a). Davenport then appealed to the Court of Appeals for the Second Circuit, which affirmed the judgment of Cannella, J., in an opinion filed December 29, 1969 (A. 19a-21a), published at 420 F. 2d 294.

Undaunted, Davenport instituted the present third series of proceedings in the United States District Court for the Southern District of New York. With immaterial variations from his prior federal complaint, he again asserted that the rent control law and its particular application to him were unconstitutional. The complaint was dismissed by an unpublished order and opinion of Tenney, J., dated May 11, 1970 (A. 22a-26a).

Again, Davenport appealed to the Court of Appeals. Respondents moved under Rule 2 of the Federal Rules of Appellate Procedure to dismiss the appeal "on the ground that the said appeal is frivolous and wholly without merit." The moving papers recited that earlier federal proceedings had terminated in a Court of Appeals decision and that the current action had been dismissed by the District Court with an express holding that the prior determination was *res judicata*.

The motion to dismiss, made about July 10, 1970, was not decided by the Court of Appeals until well after Davenport had filed his brief in support of his appeal on about July 29, 1970. In a brief order, without opinion, respondents' motion to dismiss Davenport's appeal was granted. The September 24, 1970 order is the subject of this petition for a writ of certiorari.

## ARGUMENT

### The appeal below was properly dismissed because the issue of constitutionality of rent control had been decided adversely to the appellant in prior litigation.

It is clear from the record that Davenport's attempt to litigate the constitutionality of the rent control law and its application to his circumstances is essentially a repetition of litigation he had engaged in unsuccessfully both in the federal courts and in the courts of New York. The doctrine of *res judicata* is a bar to such needless and repetitious litigation. *Angel* v. *Bullington*, 330 U. S. 183, 192 (1946).

The constitutionality of rent controls has been sustained by this Court against a wide variety of attacks over a long number of years:

*Block* v. *Hirsh*, 256 U. S. 135 (1921);
*Marcus Brown Co.* v. *Feldman*, 256 U. S. 170 (1921);
*People ex rel. Durham R. Corp.* v. *La Fetra*, 230 N. Y. 429 (1921), app. dism. 257 U. S. 665 (1921);
*Bowles* v. *Willingham*, 321 U. S. 503 (1944);
*Twentieth Century Associates* v. *Waldman*, 294 N. Y. 571 (1945), app. dism. 326 U. S. 697 (1946);
*Woods* v. *Miller Co.*, 333 U. S. 138 (1948);
*Lincoln Bldg.* v. *Barr*, 1 N Y 2d 413, 153 N.Y.S. 2d 633 (1956), app. dism. 355 U. S. 12 (1957);
*Four Maple Drive Realty Corp.* v. *Abrams*, 2 A D 2d 753, 153 N.Y.S. 2d 747 (1956), aff'd. 2 N Y 2d 837, 159 N.Y.S. 2d 976 (1957), app. dism. 355 U. S. 14 (1957);
*I.I.F.Y. Co.* v. *Temporary State Housing Rent Commission*, 10 N Y 2d 263, 219 N.Y.S. 2d 249 (1961), app. dism. 369 U. S. 795 (1962);

*8200 Realty Corp.* v. *Lindsay*, 27 N Y 2d 124, 313 N.Y.S. 2d 733, app. dism. —— U. S. ——, 91 S. Ct. 367 (Dec. 21, 1970).

No substantial issues, legal or factual, were presented below in this litigation.

## CONCLUSION

**The petition for certiorari should be denied.**

February 9, 1971.

Respectfully submitted,

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